

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 PAUL HUPP,) Civil No. 12cv0492 GPC(RBB)
12 Plaintiff,)
13 v.) ORDER
14) (1) GRANTING DEFENDANTS' EX
15 SAN DIEGO COUNTY, SAN DIEGO) PARTE APPLICATION TO MODIFY
16 POLICE DEPARTMENT, et al.,) THE SCHEDULING ORDER [ECF NO.
17 Defendants.) 203]; AND
)
) (2) GRANTING DEFENDANTS'
) MOTION TO COMPEL PLAINTIFF'S
) DEPOSITION [ECF NO. 203
) ATTACH. #1]
)

On December 4, 2013, Defendants County of San Diego, James Romo, Peter Myers, and Joseph Cargel filed an Ex Parte Motion to Modify The Scheduling Order by Extending the Deadline for Completing Discovery [ECF No. 203]. In their Ex Parte Motion to Modify, Defendants sought a thirty-day extension of the November 4, 2013 discovery cutoff date so a motion to compel the Plaintiff's deposition could be filed. (Defs.' Ex Parte Mot. Modify 2-3, ECF No. 203.) The motion to compel is attached to the Defendants' Ex Parte Motion. (*Id.* Attach. #1 Mem. P. & A. 2-8.) Plaintiff Paul Hupp filed an opposition on December 11, 2013. (See Pl. Hupp's

1 Opp'n Br. 1, ECF No. 225.) The Defendants filed their reply brief
 2 on February 10, 2014 [ECF No. 230].

3 The Court has determined that Defendants' Ex Parte Motion to
 4 Modify and the accompanying Motion to Compel Plaintiff Paul Hupp's
 5 Deposition are suitable for resolution on the papers. S.D. Cal.
 6 Civ. R. 7.1(d)(1).

7 The Defendants acknowledge that the discovery cutoff for this
 8 case was November 4, 2013. (Defs.' Ex Parte Mot. Modify 2, ECF No.
 9 203.) "On October 15, 2013, Defendants noticed Plaintiff's
 10 deposition to take place on October 25, 2013 at 9:00 a.m." (Id.)
 11 At the request of the codefendant City of San Diego, the deposition
 12 was renoticed for Friday, November 1, 2013, at 9:00 a.m. (Id.)
 13 "On October 26, 2013, the Saturday before Plaintiff's deposition
 14 was scheduled to take place, Plaintiff notified Counsel, via email,
 15 that he would not be submitting to the deposition." (Id.)
 16 "Plaintiff stated that the terms of his probation did not allow him
 17 to leave Riverside County." (Id.) Defense counsel offered to take
 18 the deposition in Riverside County or contact Plaintiff's probation
 19 officer to explain the circumstances for traveling for the
 20 deposition. (See id.) Hupp would not agree to either. (Id.)

21 Defense counsel planned to file a motion to compel Plaintiff's
 22 deposition on December 2, 2013, thirty days from the scheduled
 23 deposition date for which Plaintiff failed to appear. (Id. at 3.)
 24 Because the discovery cutoff had passed, Defendants filed the
 25 pending application.

26 Plaintiff opposes the Ex Parte Application to Modify. Hupp
 27 argues that Defendants "fail[ed] to timely seek a motion to
 28

1 compel." (Pl. Hupp's Opp'n Br. 4, ECF No. 225.) Plaintiff asserts
 2 that an extension of time should not be granted.

3 To determine whether "good cause" exists to
 4 extend time courts typically review, but are not
 5 limited to, such factors as 1) scheduling issues;
 6 2) past, present and current time demands and
 7 commitments of the parties; 3) a party's assurances
 8 that an extension of time will not unduly delay the
 9 case; and last 4) the parties' good faith efforts
 to "meet and confer" regarding the discovery issues
 in a timely manner. DEFENDANTS fail to meet any of
 the four (4) factors. In fact[,] DEFENDANTS have
 not even tried to address these or any other factors
 on why they should be entitled to extend time.
 9

10 (*Id.*) He is largely correct. In essence, Defendants outline the
 11 Plaintiff's unilateral refusal to appear for his deposition, and
 12 Defendants maintain that they believed a motion to compel the
 13 taking of Plaintiff's deposition could be filed within thirty days
 14 of Hupp's failure to appear for the deposition on November 1, 2013,
 15 although the discovery cutoff date was November 4, 2013. (Defs.'
 16 Ex Parte Appl. Modify Attach. #2 Decl. Welsh 3, ECF No. 203.)

17 There are additional relevant facts. "[C]ourts consider a
 18 number of factors in determining whether to consider the merits of
 19 a motion to compel filed after expiration of the controlling
 20 deadline." 3 James Wm. Moore et al., Moore's Federal Practice
 21 § 16.13[1][c], at 16-57 (3d. ed. 2013). The following are
 22 relevant:

- 23 • The length of time since the expiration of the
 deadline;
- 24 • The length of time that the moving party has known
 about the discovery;
- 25 • Whether the discovery deadline has been extended;
- 26 • The explanation for the tardiness or delay;
- 27 • Whether dispositive motions have been scheduled or
 filed;

1 • The age of the case;

2 • Any prejudice to the party from whom late discovery
3 was sought; and

4 • Disruption of the court's schedule.

5 Id.

6 Defendants moved to extend time and compel discovery within
7 thirty days of the discovery cutoff. The ex parte application was
8 brought within thirty days of the Plaintiff's failure to appear for
9 his deposition. The discovery cutoff in this case was set on March
10 11, 2013, and has not been extended [ECF No. 118]. Dispositive
11 motions have been heard and are pending [ECF 252]. The Complaint
12 was filed on February 28, 2012. (Compl. 1, ECF No. 1.) There is
13 no prejudice to Plaintiff from participating in legitimate
14 discovery. And a deposition can be set so as not to disrupt the
15 schedule in this case. For all these reasons, the Defendants Ex
16 Parte Application to Modify the Scheduling Order is granted.
17 Consequently, Defendants' motion to compel Plaintiff's deposition
18 will be resolved on its merits.

19 Defendants argue that "Plaintiff entirely fails to address any
20 substantive reason why Defendants' Motion to Compel should be
21 denied, or articulate any legally tenable argument that would
22 obviate their legitimate need for his deposition, particularly in
23 light of his willful failure to attend it when timely scheduled."
24 (Defs.' Objection Hupp's Untimely Opp'n 3, ECF No. 230.) In his
25 opposition, Hupp argues that Defendants "could have taken
26 Plaintiff's deposition in August, or September, [o]r October, [but]
27 they did not." (Pl. Hupp's Opp'n Br. 3, ECF No. 225.) Hupp does
28 not explain why his refusal to participate should be excused based

1 on the fact that Defendants scheduled his deposition for November
 2 1, 2013, a date before the discovery deadline. Plaintiff also
 3 complains that Defendants "could have easily submitted written
 4 discovery going back to March 2013, [but] they did not." (Id.)
 5 Additionally, he contends that Defendants' motion to compel should
 6 be denied because the Court previously denied Hupp's requests for
 7 extension of time to oppose Defendants' substantive motion and also
 8 denied him leave to amend the complaint to add additional parties.
 9 (Id. at 3-4.) These arguments are unavailing and irrelevant.
 10 Indeed, Hupp's explanations for his conduct demonstrate that he
 11 acted in bad faith in refusing to attend his deposition.

12 A party may take another party's duly noticed deposition in
 13 person as a matter of right. Fed. R. Civ. P. 30. If the party to
 14 be examined fails to appear after being served with a proper notice
 15 of deposition, the court may make such orders concerning the
 16 failure as are just, including dismissal. Fed. R. Civ. P.
 17 37(b)(2)(C); see Connecticut Gen. Life Ins. Co. v. New Images of
Beverly Hills, 482 F.3d 1091, 1096 (9th Cir. 2007) (willfulness,
 19 bad faith and fault in failing to comply with discovery orders
 20 justify the sanction of dismissal). It is established that
 21 sanctions, including dismissal, may issue for a complete or serious
 22 failure to respond to discovery, such as failure to appear for a
 23 deposition, even absent a prior court order compelling the
 24 discovery. Siglano v. Mendoza, 642 F.2d 309, 310 (9th Cir. 1981).
 25 Failure of a party to attend his own deposition may result in
 26 orders taking designated facts to be established, limiting claims
 27 or defenses or the introduction of evidence, or striking out
 28 pleadings, staying proceedings, dismissing the action, or rendering

1 a default judgment. Fed. R. Civ. P. 37(d). A deponent's
2 cancellation of a deposition a day before the date set has been
3 held to constitute a failure to appear within the meaning of Fed.
4 R. Civ. P. 37(d). Henry v. Gill Indus., Inc., 983 F.2d 943, 947
5 (9th Cir. 1993).

6 A plaintiff must prosecute his case with "reasonable
7 diligence" to avoid dismissal. Anderson v. Air West, Inc., 542
8 F.2d 522, 524 (9th Cir. 1976). Here, Hupp refused to attend his
9 deposition and failed to provide the Court or Defendants any valid
10 reason he could not attend. Defendants are entitled to discover
11 Plaintiff's version of the events in order to properly evaluate
12 the case and their trial strategy. Accordingly, the Defendants'
13 Motion to Compel Plaintiff's Deposition is granted. The deposition
14 is to take place on or before June 13, 2014, and is limited to
15 seven hours. The Court cautions Plaintiff that failure to complete
16 the deposition may lead to dismissal of his case for failure to
17 prosecute pursuant to Federal Rule of Civil Procedure 41(b),
18 failure to comply with a court order under Federal Rule of Civil
19 Procedure 37(b), and failure to attend his deposition under Federal
20 Rule of Civil Procedure 37(d). See Goldstein v. Sillen, No. CV
21 07-5958 SBA (PR), 2011 WL 1225946, at *17 (N.D. Cal. Mar. 31,
22 2011).

23 **IT IS SO ORDERED.**

24 Dated: May 13, 2014



Ruben B. Brooks
United States Magistrate Judge

26 cc: Judge Curiel
27 All Parties of Record
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